INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Boyce Motor Lines v. *United States*, 342 U.S. 337	7
Chaplinsky v. *New Hampshire*, 315 U.S. 568	7
Harrison v. *United States*, 318 F. 2d 220, certiorari denied, 377 U.S. 911	10
Howard v. *United States*, 278 F. 2d 872	10
Hyde v. *United States*, 225 U.S. 347	12
Mattox v. *United States*, 146 U.S. 140	12
McDonald v. *Pless*, 238 U.S. 264	12
Miller v. *Strahl*, 239 U.S. 426	7
Ogden v. *United States*, 303 F. 2d 724, certiorari denied, 376 U.S. 973	10
Russell v. *United States*, 369 U.S. 749	8
Ryan v. *United States*, 191 F. 2d 779	12
Stein v. *New York*, 346 U.S. 156	12
United Public Workers v. *Mitchell*, 330 U.S. 75	7
United States v. *Annunziato*, 293 F. 2d 373, certiorari denied, 368 U.S. 919	10
United States v. *Farley*, 292 F. 2d 789, certiorari denied, 369 U.S. 857	10

743-818—64——1

Cases—Continued	Page
United States v. *Flynn*, 216 F. 2d 354	12
United States v. *Harriss*, 347 U.S. 612	7
United States v. *Healy*, 376 U.S. 75	6
United States v. *Petrillo*, 332 U.S. 1	7
United States v. *Wurzbach*, 280 U.S. 396	7
Wheaton v. *United States*, 133 F. 2d 522	12
Statutes:	
Federal Aviation Act of 1958, Sec. 902, 72 Stat. 784, as amended, 49 U.S.C. (Supp. V) 1472	2, 3, 6
18 U.S.C. 3500	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 359

ROBERT MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (A. 3 pp. 1–13;[1] Pet. App. 1–9) is reported at 332 F. 2d 944.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1964 (A. 4; Pet. App. 10). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 8, 1964,

[1] "A." designates the blue-backed papers titled "Transcript of Record In the Supreme Court of the United States" on file with the Clerk of the Court. "R." refers to the transcript of record in the court of appeals which is also on file with the Clerk.

and the petition was filed on August 7, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 49 U.S.C. 1472(j) applies to private aircraft.

2. Whether 49 U.S.C. 1472(j) is unconstitutionally vague.

3. Whether the inuictment adequately informed petitioner of the charge against him.

4. Whether reversible error was committed because the trial court failed to turn over to defense counsel a statement of a government witness, producible under 18 U.S.C. 3500, where defense counsel did not request the court that it be produced.

5. Whether the trial court erred in failing to conduct a hearing concerning an alleged impropriety during the jury deliberations.

STATUTE INVOLVED

Section 902 of the Federal Aviation Act of 1958, 72 Stat. 784, as amended, 49 U.S.C. (Supp. V) 1472, provides in pertinent part:

> (j) *Interference with flight crew members or flight attendants.*
>
> Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more

> than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life.

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted under a one-count indictment charging that, while aboard a chartered four-passenger single-engine airplane in flight in air commerce, he "did assault, intimidate and threaten Royden Dudley Schooley, a flight crew member who was the pilot of said airplane, while said pilot was in fact in actual control of said airplane in the air above the ground, so as to interfere with the performance by said pilot of his duties in controlling said airplane," in violation of 49 U.S.C. 1472(j) (R. 3, 11). Petitioner was sentenced to fifteen years' imprisonment and fined $10,000 (R. 12, 121).[2] The court of appeals unanimously affirmed (A. 3 pp. 1–13; Pet. App. 1–9).

The evidence showed that on January 6, 1962, petitioner chartered a single-engine, four-passenger airplane from Airways Service, Incorporated, for a flight from Sioux City, Iowa, to Dallas, Texas. The pilot sat in the left front seat, petitioner in the right front seat and Joe Swindler, a temporary employee of Air-

[2] In imposing sentence, the trial judge pointed out that the pre-sentence report showed that from 1953 to the date of sentencing petitioner had "difficulty with the Dallas Police Department no less than 34 times * * *" (R. 118).

ways Service, Incorporated, sat in the back seat of the airplane. The pilot, Royden Schooley, was the principal government witness.[1] Schooley testified that petitioner did not appear to be intoxicated when the plane left Sioux City (R. 40–43, 50, 63–64). The plane was first flown to Wichita, Kansas, where it made a 30-minute stop. Schooley did not see petitioner consume any liquor during the stopover, nor did he observe him carrying any liquor back to the plane (R. 42–44, 55). About ten minutes after the plane left Wichita, petitioner produced a bottle of liquor and consumed some of it (R. 44, 55–56). Subsequently, petitioner told Schooley that he was flying in the wrong direction for Dallas and, without Schooley's permission, seized the set of controls in front of him and tried to turn the plane in a different direction. After a struggle, Schooley and Swindler successfully forced petitioner to remove his hands from the controls (R. 45). Shortly thereafter, petitioner opened the door of the plane, and the others could not shut it (R. 45–46, 57–58). The pilot, noting that they were passing over Stillwater, Oklahoma, decided to land the plane at the local airport in that city (R. 46, 58). After the plane had made its approach and was about twenty feet from the ground, petitioner, saying "something about going on to Dal-

[1] The government requested a continuance since Swindler, who was on active duty overseas in the Air Force at the time the case was set for trial, could not be brought back to testify. Defense counsel objected on the ground that Swindler's testimony "would only be cumulative," and the court denied the government's request (R. 37, 35–38, 77).

las," again seized the controls and "froze on them" (R. 47, 58–59). While Schooley and Swindler were trying to remove petitioner from the controls, the plane rose to about 400 feet and lost air speed. Finally, Swindler hit petitioner with the whiskey bottle, thereby loosening his hold on the controls. After Schooley regained control of the plane, petitioner turned off the ignition switch and removed the key, which he placed in his pocket. Despite this, the pilot was able to make a safe "dead stick" landing (R. 47–48, 59–60, 69).

Two F.B.I. agents testified to an interview with petitioner on May 19, 1962.[4] Petitioner said that he was a pilot himself, and that he did not like the way Schooley, who seemed to have a headache, was flying the plane. He further said that after he decided to take over the controls of the aircraft, he engaged in a "scuffle" with the others aboard, became angry and "cut the switch on the airplane," and that he then was knocked out and did not remember anything until the plane landed (R. 70–73, 75–77).

Petitioner testified in his own defense that he was about "three-fourths drunk" when he boarded the aircraft in Sioux City, Iowa; that he drank additional liquor in the plane after it had left Wichita; and that he was asleep most of the trip. When he awoke, he saw the plane about twenty feet off the

[4] Petitioner was told that the agents were there to arrest him and that he did not have to make a statement. He said that as a lawyer he knew his rights (R. 72).

ground and the pilot holding his head; that he thought the pilot was sick, and he seized the controls in order to save his own life; and that the next thing he recalled was waking up in jail in Stillwater, Oklahoma. He denied making a statement to the F.B.I. agents about these incidents, claiming that he spoke to them only about football (R. 82, 78–90).

ARGUMENT

1. Petitioner's argument (Pet. 19–22) that a private aircraft is not within the purview of 49 U.S.C. 1472(j) is without merit. In *United States* v. *Healy*, 376 U.S. 75, this Court held that a companion provision of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(i)), punishing aircraft piracy, covered private aircraft. There is no reason to believe that Congress meant Section 1472(j), which was part of the same body of legislation as Section 1472(i), to have any narrower compass. The safety of the airlanes requires that pilots of all craft, commercial or private, be free from harassment or intimidation during flight.

2. The statute is not unconstitutionally vague or indefinite. The words "assaults", "intimidates" and "threatens" have a well-understood meaning. Congress did not punish all assaults on crew members on an airplane in flight, but only those assaults or threats that "interfere with" or "lessen the ability" of a crew member "to perform his duties;" this limitation does not render the statute unconstitutionally vague and indefinite. The statute is at least as definite as lan-

guage in other statutes which this court has sustained.[5] The settled rule is that so long as the conduct involved in the particular case is definitely understood to be unlawful, it matters not that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls * * *." *United States* v. *Petrillo*, 332 U.S. 1, 7; *United States* v. *Harriss*, 347 U.S. 612, 618; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 103–104.

3. The indictment, which charged in the words of the statute, admittedly (see Pet. 17) set forth the elements of the offense. Nor is any claim made that it would not protect petitioner from a second prosecution for the same offense. The sole deficiency alleged is that the form of assault or intimidation was not specified. However, the fact that the assault or threat interfered with or lessened the ability of a specified crew member to perform his duties was clearly alleged in this indictment,[6] and no more specificity was needed to inform petitioner of the crime

---

[5] See, *e.g.*, *United States* v. *Wurzbach*, 280 U.S. 396 (political purposes); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (any offensive, derisive word); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (practical and feasible); *Miller* v. *Strahl*, 239 U.S. 426 (to do all in one's power).

[6] The indictment charged that petitioner "did assault, intimidate and threaten Royden Dudley Schooley, a flight crew member who was the pilot of said airplane, while said pilot was in fact in actual control of said airplane in the air above the ground, so as to interfere with the performance by said pilot of his duties in controlling said airplane and greatly lessen the ability of said pilot to perform his duties while controlling said airplane, in violation of Title 49, U.S.C.A., Section 1472(j)" (R. 3).

with which he was charged. Petitioner's reliance on *Russell* v. *United States*, 369 U.S. 749, is misplaced. There the indictment, charging a refusal to respond to questions put by a Congressional subcommittee, was held insufficient because it did not identify the subject matter under inquiry by the subcommittee—an element which went to "the very core of criminality" (369 U.S. at 764). Here the element which went to the "core of criminality"—*i.e.*, the fact that the assault and intimidation interfered with the operation of the craft—was clearly spelled out. Moreover, as the court of appeals observed, seven months before trial petitioner knew from Schooley's affidavit what had allegedly occurred on the flight (Pet. App. 4–5). This affidavit was substantially similar to the witness's trial testimony. Compare R. 125–126, with R. 40–49, 67.

4. On cross-examination, F.B.I. agent Drain, who had testified to statements by petitioner at the time of his arrest, testified that during his conversation with petitioner he had made notes of what was said, but had not shown the notes to petitioner. The notes were shortly thereafter embodied in a report which he had examined before testifying and a copy of which was in the possession of the government (R. 74). The following then occurred (R. 74–75):

> Mr. PARR. [Assistant United States Attorney] (Interposing). If the Court please, I don't know what he is driving at. No question but we have a copy of the report. It's the only way I would know anything about the case.
>
> Q. (By Mr. BURGER) [Defense Counsel] Do you have any objection, Mr. Drain, to my seeing the report?

> Mr. PARR. May it please the Court, I object to that question. It is entirely incompetent, irrelevant and immaterial. Counsel knows that under Title 18, United States Code, Section 3500, he is entitled to a copy of a statement after a witness testifies, the statement of the witness, but no statement has been taken in this case from this witness.
>
> The WITNESS. Only the pertinent things to this case were recorded. The entire conversation wasn't recorded.
>
> Q. Do you have objection to my seeing the pertinent things to this case?
>
> Mr. PARR. May it please the Court, I object to that question. That's improper cross-examination.

Defense counsel addressed no request for production to the court and the court made no statement or ruling on the matter. The court of appeals, recognizing (as the government had conceded) that the report of the agent was a producible document under 18 U.S.C. 3500, held that no error had been committed by the district court since no request for production had been addressed to the court (Pet. App. 7–8).

Section 3500(b) provides in pertinent part that "[a]fter a witness called by the United States has testified on direct examination, the court shall, *on motion of the defendant*, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." (Emphasis added.) While

we agree that no particular form of words is necessary to constitute a demand for production, the court of appeals was correct in concluding that there had been no request whatever, in any form, for any ruling by the trial judge. Defense counsel only addressed a rhetorical inquiry to the witness, asking whether he would have any objection to counsel's seeing his report (R. 74–75). That no ruling of the court was sought or contemplated by this remark is confirmed by the fact that the court did not respond to it nor did defense counsel pursue the matter any further. The failure to request production could well have been deliberate, since petitioner ultimately denied that he made the statements attributed to him by the agent, and a written report, if produced in the presence of the jury, would have undermined his denial.[7] In these circumstances, petitioner cannot now be heard to complain that he was denied a document producible under 18 U.S.C. 3500. See *Ogden* v. *United States,* 303 F. 2d 724, 733 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Farley,* 292 F. 2d 789, 792–793 (C.A. 2), certiorari denied, 369 U.S. 857; *United States* v. *Annunziato,* 293 F. 2d 373, 382 (C.A. 2), certiorari denied, 368 U.S. 919.

---

[7] In *Howard* v. *United States,* 278 F. 2d 872 (C.A.D.C.), on which petitioner relies, the request of defense counsel for the document in issue—"May I see it?" (278 F. 2d at 874, n. 6)—was, to the understanding of the parties, directed to the judge and not to the witness. The District of Columbia Circuit has held that there can be no error resulting from a failure to produce Jencks Act statements without some form of request. See *Harrison* v. *United States,* 318 F. 2d 220, 221, certiorari denied, 377 U.S. 911.

5. On April 15, 1963, before sentencing and almost a week after the jury verdict of April 9, 1963, defense counsel stated to the trial judge that he had just been informed by one of the jurors that, during the noon recess while the jury was deliberating, the juror had suffered a heart attack; that the rest of the jury and the marshal knew of this attack; that the juror was given a 30-minute rest before deliberations began again; that prior to going to lunch he advised the foreman and the other members of the jury that he was of the opinion that petitioner was not guilty; and that he signed the jury vedict because he was in fear of his health after it became apparent that there would be additional argument during the deliberations (R. 112–113). Thereafter, at the sentencing proceeding, petitioner stated that he would not have been found guilty "had not a man had a heart attack at lunch. That man is in this courtroom now" (R. 117). The judge responded that he knew nothing about the circumstances except what counsel for the defense had previously told him, and that the juror's verdict "cannot now be impeached" (*ibid.*).

On these facts, petitioner now contends (Pet. 6–10) that the trial court was obliged to conduct a hearing at which the marshal, bailiff and the juror could have been interrogated to determine the true facts. We submit however, that if counsel seriously wished to challenge the validity of the verdict, the method chosen was totally inappropriate. No formal motion was presented; no affidavit by the juror was filed; there was not even a representation by counsel as to

whether he had asked the marshal or bailiff about what had occurred. In view of the fact that the juror in question had never sought to communicate with the court about his alleged illness, and had not raised any question at the time the verdict was entered in open court, counsel could not expect the court to act upon the hearsay statement regarding the juror's alleged illness and the circumstances of the verdict. This is particularly true in light of the general principle that a juror's testimony impeaching his own verdict is not to be accepted. *McDonald* v. *Pless*, 238 U.S. 264, 267–269; *Hyde* v. *United States*, 225 U.S. 347, 384; see *Stein* v. *New York*, 346 U.S. 156, 178.[8] In order to justify an exception to this rule, which might well have been appropriate on an adequate showing, petitioner's counsel should at least have offered the juror's affidavit and filed a formal motion for a new trial.

---

[8] *Mattox* v. *United States*, 146 U.S. 140, and *Wheaton* v. *United States*, 133 F. 2d 522 (C.A. 8), relied upon by petitioner (Pet. 8), are inapposite. Unlike the instant case, they involved direct and flagrant interference by bailiffs with a deliberating jury. Similarly inapposite are *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), which concerned allegedly improper statements by a juror to a third party stranger, and *Ryan* v. *United States*, 191 F. 2d 779 (C.A. D.C.), involving communications between government counsel and certain jurors during a recess in the trial. Moreover, in all these cases, the issue was formally presented by an appropriate motion.

6. The severity of a sentence (assuming that it is within legal limits) is not of course an issue on appeal. Nonetheless, we believe it appropriate to advise the Court that the Solicitor General has been concerned by the unusual severity of the jail sentence imposed in this case, and that he has discussed the matter with the United States Attorney for the District of Oklahoma. The explanation of the sentence, we believe, is that the district judge wished to impress most forcibly upon petitioner the extreme danger to life and limb attendant upon conduct of the kind in which he had engaged. We also have reason to believe that the district judge would now be receptive to a motion to reduce sentence (which petitioner may file at any time within sixty days of a denial of certiorari). The United States will support a very substantial modification of the sentence if such a motion is filed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1964.